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Private Law: Prescription

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PRESCRIPTION

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To say that the Louisiana law on prescription is complicated, puts it mildly. In addition to the basic provisions in the Civil Code, there are time limitations in any number of statutes throughout the spectrum of subject matters. When there is inadequate care in the legislative drafting, the result is a confusion which creates uncertainty in the law and more work for the courts. The judicial determination may clarify the legislative intent, or it may in fact create one where none really existed. The latter seems to have been the case with Act 584 of 1960 which appears in R.S. 9:5682 in the following terms:

> An action by one heir or legatee . . . is prescribed in ten years if the third person or his ancestors in title, singly or collectively, have been in continuous, uninterrupted, peaceable, public, and unequivocal possession of the property. . . .

The first phrase is written in language of liberative prescription, the second part is a verbatim reproduction of the language of the ten-year acquisitive prescription in article 3487. This is distinguished from the thirty-year acquisitive prescription language in article 3500 where the word "peaceable" does not appear.

The statute poses a number of questions: (1) is the prescription liberative or acquisitive? (2) if acquisitive, are the requirements of "good faith" and "just title" necessary? (3) what rules govern "tacking" of possessions?

When a statutory provision is as ambivalent as this one, the questions could possibly be answered in one way or another. In such circumstances, the judicial determinations are policy decisions. This may explain the variety of opinions that have been expressed. In *Trahan v. Broussard*,[1] the supreme court held that the prescription was acquisitive but that good faith was not required. On the latter point, there was a well-reasoned dissent which was supported by a majority of the court on rehearing in *All-State Credit Plan Natchitoches, Inc. v. Ratliff*,[2] thereby overruling *Trahan* to that extent. Furthermore, with the application of the Civil Code general principles of ten-year acquisitive prescription, it is not permissible to tack a good faith possession to a bad faith possession in order to satisfy the time requirement. The latest decision was not without dissent but

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1. 251 La. 714, 206 So. 2d 82 (1968).

2. 279 So. 2d 660 (La. 1973).

the conclusions are sound and well-reasoned, and should remain that way.[3]

ACQUISITIVE PRESCRIPTION

Precarious Possession

A precarious possessor is one who occupies a property while the legal possession is vested in another. He lacks the requirement of possessing "as owner" because the nature of his holding acknowledges another person as the owner, such as the tenant who holds under a lease from a different person. To change a precarious possession into the kind of legal possession that is necessary for acquisitive prescription is obviously not a simple matter nor is it often established. However, it can be done where the precarious possessor accompanies his occupation with acts which are hostile and adverse and give notice to the legal possessor that he (the precarious possessor) means to possess henceforth as exclusive owner.

A co-heir who takes over the whole property is a precarious possessor of the shares of his co-heirs, and an owner in indivision cannot acquire by prescription the rights of his co-owners in the property owned in common. However, in *Givens v. Givens*[4] the person occupied the whole property in accordance with a recorded instrument of donation (*omnium bonorum*), and although this transaction was an absolute nullity the court held that the recordation constituted sufficient notice to transform the precarious possession into a legal possession for thirty-year acquisitive prescription. This amounts to saying that the constructive (and improbable) knowledge of what is on the public records, even an absolute nullity, may be considered as meeting the test of an "overt manifestation" although the open physical occupation of the property does not serve this purpose. Analytically, the conclusion does not sit well; however, as a policy matter, the decision may serve the interests of society in the stabilization of land titles. In refusing a writ, the supreme court said "on the facts found . . . the result is correct."[5]

3. *See also* Kasell, *Suits against the United States Under the Federal Rules of Civil Procedure*, 14 LOYOLA L. REV. 64 (1967-68); Pascal, *Civil Code and Related Subject Matter*, 21 LA. L. REV. 64 (1960); *The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Prescription*, 28 LA. L. REV. 346, 352 (1968); Note, 42 TUL. L. REV. 219 (1967).

4. 273 So. 2d 863 (La. App. 2d Cir. 1973).

5. Givens v. Givens, 275 So. 2d 868 (La. 1973).

Good Faith

Board of Commissioners v. Elmer[6] contains a very good discussion of the elements necessary for the ten-year acquisitive prescription, but these comments are directed only to the matter of "good faith." This requires not only a subjective positive belief but also an objective reasonable basis of facts for this belief that the acquired title is valid. Although there is no duty to make a formal title examination, the courts have held that circumstances which should excite inquiry create a duty to examine title; thus, failure to do so is the same as having checked the records without finding the flaw, thereby precluding good faith.[7] A non-warranty deed, by its very nature, asserts the refusal of the transferor to stand behind the conveyance so that, analytically, the transferee is given an uncertainty and a doubt. However, from a practical viewpoint, the quit-claim deed has been so extensively used in Louisiana that the courts have accepted it as a basis for the good faith prescription of ten years.[8]

In the cited case, there was not only a non-warranty deed but also a suspiciously low price, and the court held that "the reasonableness of the purchase price is one of the critical factors bearing upon the issue of good faith."[9] On rehearing, the case was remanded to establish the property value, but in the footnote to the above quotation, the author of the opinion makes the following statement:

> I do not believe the purpose of these codal articles was to permit the passage of ten years to cure the defects in the title of a person who speculated by purchasing property at an insignificant price under a quit-claim deed (especially from a vendor who acquired by tax sales) or other deed of doubtful validity. There is no legal good faith in this type of purchaser, and only the prescription of 30 years is applicable.
>
> If, after trial on remand, it is found that the purchase price paid by Dr. Elmer in 1949 was so insignificant in comparison to the actual value of the property that when considered with the other facts and circumstances of this case, he could not have reasonably believed his vendor's title was valid, his claim of ownership based on possession for ten years in good faith should be denied.[10]

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6. 268 So. 2d 274 (La. App. 4th Cir.), *writ refused*, 263 La. 613, 268 So. 2d 675 (1972).

7. Juneau v. Laborde, 219 La. 921, 54 So. 2d 325 (1951).

8. Smith v. Southern Kraft Corp., 202 La. 1019, 13 So. 2d 335 (1943), *noted in* 5 LA. L. REV. 484 (1943).

9. 268 So. 2d at 284.

10. *Id.* n.4.

LIBERATIVE PRESCRIPTION

Classification of the Cause of Action

As long as there are so many different periods for the prescription of various kinds of causes of action, there will be disputes concerning their classification. Until such time as the categories can be reduced or eliminated, it is necessary to work with the existing rules for the solution of the inevitable problems.

A few years ago in *Pelican States Associates, Inc. v. Winder*,[11] both the court of appeal and the supreme court classified a hospital's claim for room and board and other services as an "action on account" subject to the three-year prescription of article 3538. Neither opinion cited any authority for this conclusion. In the more recent case of *Credit Service Corp. v. Prack*,[12] the court of appeal followed the *Winder* classification but no reference is made to the analytical criticism leading to the contrary conclusion that hospital charges should fall under the ten-year prescription for personal actions under article 3544.[13] Nor is reference made to the supreme court opinions which emphatically state that the prescriptive period is fixed by the nature of the debt not by the fact that an account is rendered showing that the debt is due.[14]

The inclusion of "accounts" within the group of claims subject to the three-year prescription of article 3538 was made in the Revised Civil Code of 1870, following Ray's Proposed Revision of 1869 in conformity with the original enactment in Act No. 118 of 1852.[15] There was no corresponding provision in the Civil Codes of 1825 and 1808, nor does this appear in the Code Napoleon.

In the case under consideration, the court stated "hospital charges constituted the type of account for which statements are usually rendered."[16] The same can be said for claims subject to the shorter prescriptions under article 3534 or the longer prescriptions of articles 3540, 3544 and 3545. Similarly, the fact that it is customary for banks and brokers to render "statements" does not necessarily

11. 208 So. 2d 355 (La. App. 1st Cir. 1968), *aff'd*, 253 La. 697, 219 So. 2d 500 (1969).

12. 270 So. 2d 643 (La. App. 2d Cir. 1972).

13. *The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Prescription*, 30 LA. L. REV. 235 (1969).

14. Jones v. Jones, 236 La. 52, 106 So. 2d 713 (1958); Antoine v. Franichevich, 163 So. 784, 786 (La. App. Orl. Cir. 1935), *aff'd*, 184 La. 612, 167 So. 98 (1936). *See The Work of the Louisiana Appellate Courts for the 1958-1959 Term—Prescription*, 20 LA. L. REV. 235, 236 (1960).

15. *See* LA. CIV. CODE art. 3538 (comp. ed., 17 West LSA-Civ. Code 1972).

16. Credit Serv. Corp. v. Prack, 270 So. 2d 643, 645 (La. App. 2d Cir. 1972).

classify claims under such statements as actions "on account" for the three-year prescription of article 3538.

In *Tillman v. New Orleans Saints Football Club*,[17] a football player made a claim under his contract of employment. The defendant pleaded the one-year prescription of article 3534 against "servants," as comprehending all cases of a master-servant relationship. The court properly rejected this argument on the ground that the Civil Code has specific prescriptive periods for certain kinds of employment relationships so that the term "servants" in article 3534 could not possibly be all-inclusive. Furthermore, in view of the similarity of the Code Napoleon and the interpretation of the French commentators, the court held that the word "servants" in article 3534 does not apply to persons (1) who are employed under salaried contracts like football players, and (2) the proper prescriptive period is the ten-year general provision for personal actions of article 3544. It is regrettable that an earlier case did not reason in the same way for the claim of a trained nurse but felt constrained to classify a nurse as a "servant" within article 3534.[18]

Another case in which the court properly looked to the nature of the basic debt for the classification of the cause of action was *Masset v. Carver*.[19] In a judicial separation, the husband assumed full responsibility for certain community debts, releasing the wife entirely. This was not an acknowledgement to interrupt prescription nor was it a *stipulation pour autrui*, but was subject to the three-year prescription of the alleged original loan under article 3538.

A different problem of classification appears in the case of *Barrios v. Sara Mayo Hospital*[20] involving a malpractice suit against a physician. The argument that in such a situation there can be either a tort action (one year) or a breach of contract (ten years) or both is really incorrect on all scores because article 3538 provides a three-year prescription for physicians and this should cover all claims arising out of the physician-patient relationship. This has been discussed in the comments of prior *Symposia*.[21] The confusion of having three different possible classifications creates uncertainty in the law and seems to result in judicial policy decisions in individual cases.

17. 265 So. 2d 285 (La. App. 4th Cir. 1972).

18. Drs. Toler & Toler v. Munson, 163 So. 189 (La. App. 1st Cir. 1935).

19. 265 So. 2d 456 (La. App. 4th Cir. 1972).

20. 264 So. 2d 792 (La. App. 4th Cir. 1972).

21. *The Work of the Louisiana Appellate Courts for the 1963-1964 Term—Prescription*, 25 LA. L. REV. 352, 355-56 (1965); *The Work of the Louisiana Appellate Courts for the 1962-1963 Term—Prescription*, 24 LA. L. REV. 210, 213-14 (1964).

Starting Point for the Running of Time

Horil v. Napko Paint Co.[22] was a redhibitory action in which the court properly applied the one-year prescription running from the date of the sale as expressly provided in article 2534, rather than from the discovery of the defect.[23]

In *Cyr v. Louisiana Intrastate Gas Corp.*,[24] an agreement to lay a pipeline through a tract of farm land contained a provision that the lines would be buried so as not to interfere with cultivation. The court found that there was a breach of this obligation in that the lines were not deep enough, and that the landowner's right to rescind or his right to specific performance was subject to the ten-year prescription of article 3544. The landowner contended that the time did not begin to run until he discovered the breach when he wanted to change from rice to sugar cane, pleading the doctrine of *contra non valentem agere non currit praescriptio*. However, the original contract breach was not concealed by ruse or misrepresentation or anything which prevented the landowner from ascertaining the actual facts, and this plea was accordingly dismissed. If the landowner brought suit for damages under articles 3536 and 3537, the prescriptive period would be one year and the starting point for the running of time would be the date of his knowledge of the damage.

Interruption

In *Nini v. Sanford Brothers, Inc.*,[25] the plaintiff instructed his attorney to institute a lawsuit but he was killed in an accident prior to the actual filing of the lawsuit. By the time his widow was substituted as party-plaintiff, the prescriptive period had run. The supreme court held that the suit had been filed in a court of competent jurisdiction and proper venue,[26] that it gave notice to the defendant of the legal proceedings, and therefore constituted an interruption of prescription.

In *Northland Insurance Co. v. Kajan Specialty Co., Inc.*,[27] a timely suit was filed for personal injuries and wrongful death. Then, more than one year after the accident, but before trial, the insurer as subrogee brought an action to recover damages paid to replace the

22. 270 So. 2d 261 (La. App. 4th Cir. 1972).

23. *Cf. The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Prescription*, 31 LA. L. REV. 261-62 (1971).

24. 273 So. 2d 694 (La. App. 1st Cir. 1973).

25. 276 So. 2d 262 (La. 1973).

26. LA. R.S. 9:5801 (1950), *as amended by* La. Acts 1960, No. 31 § 1.

27. 277 So. 2d 518 (La. App. 1st Cir.), *writ refused*, 281 So. 2d 744 (La. 1973).

demolished vehicle. The court held that the timely suit by one plaintiff-subrogor interrupted prescription as to another plaintiff-subrogee where both causes of action arose out of the same incident. This was distinguished from the case of *American Security Insurance Co. v. Insurance Co. of North America*[28] where the action by the subrogee was filed only after the rendition of judgment in the first suit.

Levy v. Stelly[29] is an important case and may be establishing a new point in our jurisprudence concerning the interpretation of article 3519. This article provides:

> If the plaintiff in this case, after having made his demand, abandons, voluntarily dismisses, or fails to prosecute it at the trial, the interruption is considered as never having happened.

A timely tort action was filed in state court, but the second suit filed in federal court was more than one year after the accident. When the first suit was dismissed without prejudice, the defendant pleaded prescription in the second suit. The court held that the question of prescription as to the second suit must be determined as of the time of its filing at which time the first suit was still pending and viable. This was distinguished from the situation where the second suit is filed *after* the abandonment or dismissal of the first suit,[30] thereby limiting the application of article 3519. The dissenting opinion insisted upon the literal retroactive application of the code provision to all cases of abandonment or dismissal. Analytically, there may be merit to this position, but the majority took the other view presumably looking also to the policy consideration of preserving a substantive right against the harsh result of a procedural technicality. It is noteworthy that in the denial of a writ the supreme court said "The Court of Appeal is correct."[31] The same decision in similar circumstances was handed down by another panel of the same court in *Tug Alamo, Inc. v. Electronic Service, Inc.*[32]

In *Derbofen and Juncker v. T. L. James & Co., Inc.*,[33] a timely lawsuit resulted in a favorable judgment which also reserved plaintiff's right to sue for future damages. A second suit for such damages was filed within one year from the finality of the first action but more

28. 220 So. 2d 163 (La. App. 4th Cir. 1969).

29. 277 So. 2d 194 (La. App. 4th Cir.), *writ refused*, 279 So. 2d 203 (La. 1973).

30. *Cf.* Adams v. Aetna Cas. & Sur. Co., 252 La. 798, 214 So. 2d 148 (1968); Long v. Chailan, 196 La. 380, 199 So. 222 (1940).

31. Levy v. Stelly, 279 So. 2d 203 (La. 1973).

32. 275 So. 2d 419 (La. App. 4th Cir. 1973).

33. 274 So. 2d 734 (La. App. 4th Cir. 1973).

than one year from the plaintiff's knowledge of the wrongdoing. Since the second suit was based on the same cause of action, the first suit constituted an interruption so that the second suit was not barred by prescription.